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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1000

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,
A Foreign Corporation, *Petitioner*,

v.

ADA SMOOT, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Indemnity Insurance Company of North America, a corporation, by its attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above cause on December 17, 1945.

OPINIONS BELOW.

The trial court filed no written opinion. The opinion of the United States Court of Appeals for the District of Columbia, (R. 25-30), has not yet been officially reported, but is reported in 152 F. (2d) 667.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered December 17, 1945. A petition for rehearing was seasonably filed, and the same was denied on January 11, 1946. (R. 32).

The statutory provision believed to sustain the jurisdiction of this Court is Section 240(a) of the Judicial Code, as amended, 28 U. S. C. Sec. 347(a).

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

On September 16, 1944, respondent filed a civil action in the District Court of the United States for the District of Columbia on a judgment entered against petitioner in the Circuit Court of Vermilion County, Illinois, on October 5, 1932, for Seven thousand nine hundred ninety-three dollars and seventy-five cents ($7,993.75), together with interest and costs. (R. 2).

In its answer to this action, petitioner admitted that the Illinois judgment had been entered, but alleged that it was unenforceable by reason of an agreement made between it and the respondent under the following circumstances, set forth in the answer: In June, 1931, respondent recovered a judgment in said Circuit Court against A. G. Hollingsworth for damages alleged to have been sustained by her as the result of negligence in the operation of his automobile. At the time of the occurrence, Hollingsworth held a policy of insurance issued to him by Fort Dearborn Insurance Company, which required in part that he furnish acceptable appeal bond should his insurance company con-

sider an appeal necessary. Hollingsworth was without means to obtain the required bond. His lawyers agreed to become indemnitors to petitioner, upon the understanding and agreement that respondent's lawyers would in turn indemnify them, respondent agreeing, in consideration thereof, not to enforce the bond. Pursuant to such understanding and agreement, petitioner executed the bond, the sole purpose thereof being to enable respondent to collect her judgment from Hollingsworth's insurance carrier. The judgment against Hollingsworth was affirmed on appeal, and thereafter, *as part of the plan and agreement to collect from his insurance carrier,* an action was filed on the bond, which resulted in the judgment. (R. 3-6). Relying upon the agreement and representations of respondent, petitioner did not contest the suit and judgment was entered October 5, 1932, or approximately twelve years prior to the filing of the civil action in the District of Columbia. (R. 2). Hollingsworth's insurance carrier went into receivership and nothing was collected from it. (R. 5). Since the entry of the judgment on October 5, 1932, one of the petitioner's indemnitors died and his estate was administered. (R. 5, 6). While petitioner has been engaged continuously in business in Vermilion County, Illinois, where the judgment was entered, and has had an agent in said County upon whom process might be served, no demand was ever made upon it for payment of the judgment, and no execution was ever issued thereon. (R. 6). Upon these facts, petitioner insisted respondent was without right to maintain her suit. (R. 6).

Respondent did not deny any of the allegations of the answer, but filed a motion for judgment on the pleadings. (R. 7). While said motion was pending in the District of Columbia, a suit in equity was filed in the Circuit Court of Vermilion County, Illinois, to vacate and set aside the judgment here relied upon, to declare the same to be void and of no force and effect, and to expunge it from the records of said Court. (R. 8-14). Respondent had notice of said

suit, and filed a motion in this cause to restrain and enjoin petitioner from proceeding in the State of Illinois, making a copy of the complaint in the Illinois proceeding a part of her motion. (R. 8-14).

On January 29, 1945, the District Court granted respondent's motion for judgment on the pleadings and entered judgment against petitioner for the amount claimed. (R. 15). It also entered a separate judgment restraining petitioner from proceeding in the equity case in the Illinois Court and restraining it from recognizing or honoring any judgment that might be entered therein insofar as such judgment might interfere with respondent's rights in the District Court action. (R. 15, 16). Petitioner noted an appeal from both judgments. On February 6, 1945, the Circuit Court of Vermilion County, Illinois, decreed that respondent's judgment against this petitioner was null and void, and of no force and effect, and accordingly set the same aside, and directed that it be cancelled and expunged of record. (R. 18-23). A certified copy of this decree was filed in the United States Court of Appeals for the District of Columbia and was treated as part of the record on appeal. (R. 27).

The United States Court of Appeals for the District of Columbia affirmed the judgment of the District Court (R. 25-29) on two grounds, (1) that petitioner's allegations of an agreement *"limiting liability . . . did not raise matters into which the District Court was obliged to inquire,"* and (2) that the subsequent decree of the Illinois Court was void because that Court had no jurisdiction in the equity proceeding. (R. 26-28). It reversed the order granting an injunction. (R. 30).

REASONS FOR GRANTING THE WRIT.

I. The decision below fails to give proper effect to applicable decisions of this court and decisions in other circuits, and is in conflict therewith on two fundamental principles of law which are of general importance, namely:

(a) It erroneously holds that where an action is brought upon a foreign judgment, the defense that the judgment was suffered to be entered in reliance upon a promise of the plaintiff not to enforce it is unavailable, because such a defense amounts to a collateral attack upon the judgment.

(b) It erroneously holds that a court has no jurisdiction to vacate and set aside its own judgment upon application of an aggrieved or defrauded party unless personal service upon the judgment creditor is effected.

II. The decision below is contrary to and inconsistent with decisions of federal and state courts upon a question of general importance, in that it holds that a judgment is not a res sufficient to sustain the in rem or quasi in rem jurisdiction of equity.

III. The decision below so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision, in that a judgment was entered without a trial, although, on the pleadings, it was clear that such action would countenance a fraud by respondent upon this petitioner.

POINT I.

The United States Court of Appeals for the District of Columbia has not Given Effect to Applicable Decisions of this Court and is in Conflict Therewith and with Decisions of Other Circuits.

(a) *As to Defense Relied Upon.*

Petitioner's answer raised a substantial issue of fact, namely, was there an agreement not to enforce liability? Sufficiently strong reasons for such an agreement were given. Respondent's ability to collect her judgment in the damage suit depended upon holding the insurance carrier. (R. 3, 4). Respondent knew this. Accordingly, she agreed to the form of indemnity arrangement negotiated by her attorneys. (R. 4, 5). They assumed a personal liability in

order to aid her. (R. 4). Her inaction for a period of twelve years is explainable only upon the theory that there was such an agreement. Upon this issue, as to whether she did agree, petitioner was clearly entitled to a trial. This right was denied by the District Court. No reasons were assigned and the basis of its decisions is a matter of conjecture. In affirming, the Court of Appeals held that this defense could have been set up in the original proceedings, and, therefore, could not be asserted here, in what it erroneously determined was a collateral attack. (R. 26). This reasoning is based upon a misconception of the defense. Part of the arrangement and agreement with respondent was that petitioner would suffer judgment to be entered. Manifestly, therefore, it could not have resisted the entry of judgment. The agreement not to enforce liability could be relied upon only when respondent violated it. This occurred when the present action was filed. Then, and not until then, could her agreement be pleaded. Accordingly, the defense relied on here could not have been asserted prior to the judgment or in the original proceedings leading up to it.

This Court has held that an agreement of the character here asserted is valid and enforceable and that affirmative relief against threatened or actual violations thereof will be granted.

> *Union Bank of Georgetown* v. *Geary*, 5 Pet. 99, 8 L. Ed. 60.
> *Cage* v. *Cassidy*, 64 U. S. 109, 16 L. Ed. 430.

Similar agreements have been recognized and held enforceable elsewhere.

> *Kelley* v. *Kriess*, 68 Cal. 210, 9 Pac. 129.
> *Roberts* v. *Miles*, 12 Mich. 297.
> *Baker* v. *Redd*, 44 Ia. 179.
> *Dew* v. *Hamilton*, 23 Ga. 414.

(b) *Jurisdiction of Illinois Court to Vacate Own Judgment.*

The judgment upon which this action was brought was entered by the Circuit Court of Vermilion County, Illinois,

in 1932. (R. 2). After the judgment in the District Court, but before the decision of the Court of Appeals, the Illinois Court entered a decree holding its prior judgment to be void and of no effect and directing that it be cancelled and expunged from record. (R. 18, 23). This decree was a part of the record on appeal. The Court of Appeals declined to recognize it, saying that "the decree * * * shows clearly and unmistakably on its face that that court had no jurisdiction * * * ". (R. 27). This holding was based on the theory that the Illinois proceeding was strictly in personam, inasmuch as respondent had no property in Illinois which would have constituted ground for an in rem proceeding, and that service on respondent by publication was insufficient to give jurisdiction for the subsequent decree. (R. 27). The Court of Appeals completely overlooked the established rule that a suit in equity for relief against a judgment at law is not a new proceeding, but is a continuation of and ancillary to the original action, and that in such a case substituted service of process is sufficient. In this aspect, we submit, the decision is in conflict with decisions of this Court and of other circuits.

Dunn v. *Clark*, 8 Pet. 1, 8 L. Ed. 845.
Merriam Co. v. *Saalfield*, 241 U. S. 22, 60 L. Ed. 868.
Dunlap v. *Stetson*, 4 Mason 349, Fed. Case No. 4164.
Higgins v. *California Prune etc. Co.*, 282 Fed. 550.
Hanna v. *Brictson Mfg. Co.*, 62 F. (2d) 139, 149.
Dickey v. *Turner*, 49 F. (2d) 998.
Hitner v. *Suckley*, Fed. Case No. 6543.

The substituted service usually allowed has been upon the attorney who represented the party in the original law action. Here, however, respondent's attorney in the original law suit was one of the parties plaintiff in the suit to set aside the judgment. (R. 18, 20). Respondent was, therefore, served by publication and received actual notice of the proceeding. (R. 8, 19).

Were such jurisdiction not recognized in our courts of equity, a defendant against whom a fraudulent judgment

was obtained would be without remedy as soon as the defrauding plaintiff removed from the state.

POINT II.

Illinois Judgment a Res Supporting Jurisdiction.

In the proceeding to vacate, the Illinois Court held there was a *res* within its jurisdiction, namely, the 1932 judgment. (R. 18). The Court of Appeals held this was insufficient to confer jurisdiction, and that in the absence of personal service of process, the Illinois decree was invalid. Although we have found no case in this Court expressly deciding that a judgment is a *res*, it would seem clear by analogy to be property in both the legal and ordinary meaning of that word. Numerous decisions in the District of Columbia and elsewhere have sustained the proposition that evidence of a debt or claim is a *res* which will support the *in rem* or quasi *in rem* jurisdiction of equity.

Jones v. *Rutherford*, 25 App. D. C. 114.
Morgenthau v. *Fidelity & Deposit Co.*, 68 App. D. C. 163; 94 F. (2d) 632.
Green v. *Brophy*, 71 App. D. C. 299; 110 Fed. (2d) 539.
Odell v. *Boyden*, 150 Fed. 731.
Blake v. *Forman Bros. etc.*, 218 Fed. 264.
Beall v. *Carpenter*, 235 Fed. 272.
Franz v. *Buder*, 11 Fed. 854.
Spellman v. *Sullivan*, 43 F. (2d) 762.

If, as the foregoing cases show, a chose in action may be the basis for exerting jurisdiction in rem, or quasi in rem, then we submit that the dockets and record books of the Illinois court were no less sufficient. This is what the Illinois Court held, and we submit that its decision has support in principle in the cases cited, which are a few among many.

POINT III.

Departure from Accepted and Usual Procedure.

In sustaining the judgment of the District Court the Court of Appeals sanctioned a departure from the accepted and usual course of judicial proceedings. Petitioner tendered a defense which raised an issue of fact. Upon that issue, in accordance with the usual course of procedure, it was entitled to a trial. Without pausing to make any inquiry into the facts, the trial court entered judgment on the pleadings, and this, notwithstanding the fact that for the purposes of the motion for judgment the allegations of the answer were admitted. The result is that petitioner was denied any opportunity to make a defense, even though, if what it claims is established, a recovery by the respondent is a clear violation of her agreement and a wrongful abuse of the Illinois judgment, which was entered without contest in reliance upon such agreement.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8991, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a corporation, *Appellant* v. ADA SMOOT, *Appellee*, and that the judgment therein of said United States Court of Appeals for the District of Columbia be reversed by this Honorable Court, and that your petitioner may have such other and

further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

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